IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1500

DON R. ERICKSON, Warden
South Dakota State Penitentiary,

Petitioner,

v.

United States of America ex rel. JOHN LEE FEATHER,
United States of America ex rel. LAVERNE BLACK THUNDER,
United States of America ex rel. AMBROSE ST. JOHN,
United States of America ex rel. JAMES R. KEEBLE,
United States of America ex rel. CURTIS SMALL,
United States of America ex rel. ROMAN V. DERBY,
United States of America ex rel. JOSEPH DAY,
United States of America ex rel. ARNOLD LAFROMBOISE,
United States of America ex rel. CLARENCE WALKER,
United States of America ex rel. THEODORE DUANE WYNDE,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER

KERMIT A. SANDE
Attorney General
State of South Dakota
State Capitol Building
Pierre, South Dakota 57501

WALTER W. ANDRE
Assistant Attorney General
State Capitol Building
Pierre, South Dakota 57501

TOM D. TOBIN
Special Assistant Attorney General
422 Main Street
Winner, South Dakota 57580

Attorneys for Petitioner

O'CONNOR PRINTERS — SIOUX FALLS, S. DAK.

TABLE OF CONTENTS

TABLE OF CITATIONS ii
INTRODUCTORY STATEMENT 2
ARGUMENT 2

I. A RECOGNITION OF THE POSITION OF THE STATE OF SOUTH DAKOTA DOES NOT REQUIRE THIS COURT TO OVERRULE *SEYMOUR V. SUPERINTENDENT*, 368 U.S. 351 (1962), OR *MATTZ V. ARNETT*, 412 U.S. 481 (1973) 2

II. THE MAJOR ARGUMENTS ADVANCED IN FAVOR OF THE RECOGNITION OF THE ORIGINAL 1867 BOUNDARIES OF THE LAKE TRAVERSE RESERVATION DO NOT REFLECT THE LANGUAGE OF THE 1891 ACT OR THE LEGISLATIVE HISTORY AND SURROUNDING CIRCUMSTANCES THEREOF 6

A. The Holding of *Seymour* and *Mattz* 8
B. The Public Domain 9
C. The Operative Cession Language 10
D. A Congressional Recognition 16
E. The Law and Order Argument 18

III. SOME ARGUMENTS ADVANCED IN FAVOR OF THE RECOGNITION OF THE ORIGINAL 1867 BOUNDARIES OF THE LAKE TRAVERSE RESERVATION ACTUALLY SUPPORT THE POSITION OF THE STATE OF SOUTH DAKOTA 21

A. Brief For The Arapahoe Tribe, The Three Affiliated Tribes And The Confederated Salish And Kootenai Tribes, *Amici Curiae* 21
B. Reply Brief for Petitioner, *DeCoteau* 22
C. Brief for the United States as *Amicus Curiae* . 25
D. The Arguments of Substance 27

IV. THE BACKGROUND OF THE GENERAL ALLOTMENT ACT IS CONSONANT WITH THE POSITION OF THE STATE OF SOUTH DAKOTA 28

APPENDIX A
APPENDIX B
APPENDIX C
APPENDIX D

TABLE OF CITATIONS

CASES:

Ash Sheep Co. v. United States,
252 U.S. 159 (1920) 11, 12, 13, 15, 27

DeCoteau v. District County Court, No. 73-1148 .....2, 24

DeMarrias v. State of South Dakota,
319 F.2d 845 (CA 8 1963),
aff'g 206 F.Supp. 549 (D.S.D. 1962) 26, 27

Ellis v. Page,
351F.2d 250 (CA 10 1965)
aff'g Ellis v. State, 386 P.2d
326 (Okl. Cr. 1963) 26

Erickson v. Feather, et al., No. 73-1500 2

Mattz v. Arnett
412 U.S. 481 (1973) .....passim

Rosebud Sioux Tribe v. Kneip, et al.,
375 F.Supp. 1065 (1974) 24

Seymour v. Superintendent,
368 U.S. 351 (1962) .....passim

State v. Molash,
86 S.D. 558, 199 N.W.2d 591 (1972) 24

United States v. Brindle,
110 U.S. 688 (1884) 16

United States ex rel. Condon v. Erickson,
478 F.2d 684 (CA 8 1973) 3

United States ex rel. Feather v. Erickson,
489 F.2d 99 (CA 8 1973) 19, 20

United States v. Pelican,
232 U.S. 442 (1914) 16

ACTS, STATUTES AND TREATIES

Treaty of February 19, 1867, 15 Stat. 505 .....passim

Act of February 8, 1887 (General Allotment Act or
Dawes Act), 24 Stat. 388 .....passim

Act of February 22, 1889, 25 Stat. 676 10

Act of March 3, 1891, 26 Stat. 989 .....passim

Act of June 17, 1892, 27 Stat. 52 25

Act of April 27, 1904, 33 Stat. 352 15

Act of March 22, 1906, 34 Stat. 80 25

Act of May 27, 1910, 36 Stat. 440 24

18 U.S.C.§ 1151 .....4, 5

P.L. 93-489 (1974) 17

P.L. 93-491 (1974) 17

MISCELLANEOUS AUTHORITIES

Annual Report of the Board of Indian
Commissioners (1891) 32

Congressional Record 7, 9, 24, 26, 28

Exec. Resolution No. 75-25,
September 4, 1974 6

11 Cong. Rec. 909 (1881) 30

11 Cong. Rec. 1000 (1881) 30

15 Cong. Rec. 2277 (1884) 29

17 Cong. Rec. 1630, 1631 (1886) 31

18 Cong. Rec. 974 (1887) 31

H.R. Rep. No. 2247, 48th Cong., 2nd Sess. 1 (1885) 31

Otis, D. S., *The Dawes Act and the Allotment of Indian Lands, (1972 Edition)* 31

LETTERS

Letter from Senator George McGovern, to Tom D. Tobin, Attorney at Law, December 5, 1974 ..... App. A

Letter from Senator James Abourezk, to Tom D. Tobin, Attorney at Law, December 2, 1974 ..... App. B

Letter from Congressman James Abdnor, to Tom D. Tobin, Attorney at Law, December 5, 1974 ..... App. C

Letter from Congressman Frank E. Denholm, to Tom D. Tobin, Attorney at Law, December 6, 1974 ..... App. D

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1500

DON R. ERICKSON, Warden
South Dakota State Penitentiary,

Petitioner,

v.

United States of America ex rel.
JOHN LEE FEATHER,
United States of America ex rel.
LAVERNE BLACK THUNDER,
United States of America ex rel.
AMBROSE ST. JOHN,
United States of America ex rel.
JAMES R. KEEBLE
United States of America ex rel.
CURTIS SMALL,
United States of America ex rel.
ROMAN V. DERBY,
United States of America ex rel.
JOSEPH DAY,
United States of America ex rel.
ARNOLD LAFROMBOISE,
United States of America ex rel.
CLARENCE WALKER,
United States of America ex rel.
THEODORE DUANE WYNDE,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER

INTRODUCTORY STATEMENT

A total of ten separate Briefs have been submitted in *DeCoteau v. District County Court*, No. 73-1148, and *Erickson v. Feather, et al.*, No. 73-1500, which are essentially directed to the effect of the Act of March 3, 1891, on the size, area or boundaries of the original Lake Traverse Reservation. The attempt to confine the arguments and replies in each Brief to only those arguments presented in each case has necessarily been difficult. The most recent example of this difficulty is the Brief for the United States as *Amicus Curiae* (hereinafter cited as B.U.S.) which was submitted in response to the Court's order of April 29, 1974, inviting the Solicitor General to express the views of the United States in *DeCoteau v. District County Court*. While the invitation to this Court did not extend to the case of *Erickson v. Feather*, the Brief submitted by the United States includes, by caption, *Erickson v. Feather*, and is stated to also express the views of the United States in this "closely related case." B.U.S. at 2. Therefore, the State will rely on the Brief for Respondent in *DeCoteau v. District County Court* (hereinafter cited as B.R., *DeCoteau)* which effectively disposes of those arguments of substance submitted prior to that date on behalf of the position of the Sisseton-Wahpeton Tribe, which need not be repeated here, and confine this Reply Brief to clarifying the position of the State of South Dakota and responding to the arguments which have been presented since that time.

ARGUMENT

I

A RECOGNITION OF THE POSITION OF THE STATE OF SOUTH DAKOTA DOES NOT REQUIRE THIS COURT TO OVERRULE *SEYMOUR V. SUPERINTENDENT*, 368 U.S. 351 (1962), OR *MATTZ V. ARNETT*, 412 U.S. 481 (1973).

In the opening sentence of the Reply Brief for Petitioner in *DeCoteau* (hereinafter cited as R.B.P., *DeCoteau)* it is stated

that the State of South Dakota "asks this Court to overrule *Seymour v. Superintendent*, 368 U.S. 351 (1962), and *Mattz v. Arnett*, 412 U.S. 481 (1973)." R.B.P. at 1, *DeCoteau*. This is *not* the position of the State of South Dakota before this Court and the following should serve to reemphasize that point.[1]

All Briefs submitted to date seem to be in agreement with the one fundamental rule that permeates this area of Federal Indian Law: Separate treaties or agreements with separate tribes must be separately construed. In the words of Petitioner in *DeCoteau*, "each agreement with a tribe must be taken on its own facts and legislative history." R.B.P., N. 13 at 8, *DeCoteau*. The standards set forth by this Court in *Mattz*, that disestablishment need only be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history, and the statement in *United States ex rel. Condon v. Erickson*, 478 F.2d 684 (CA 8 1973), cited by this Court with approval in *Mattz*, that "each case, of course, must be decided under the applicable statute and upon its own facts," are only variations of this same basic precept. *Condon, supra* at 689.

The State of South Dakota in the Brief for Respondent, *DeCoteau*, has set forth those sections of the 1891 Act, and the legislative history and surrounding circumstances, that clearly establish that the unallotted land of the Lake Traverse Reservation was restored to the public domain, and the reservation, as originally described, thereby disestablished. In the absence of some provision on the face of the Act or circumstances set forth in the legislative history, which the State has never seen, and no Brief has been able to produce, that is contrary to the probative evidence of disestablishment presented to date, this material should be dispositive of the issue — and there is nothing in the holding of either *Seymour* or *Mattz* to dictate against this result.

---

1. The Reply Brief for Petitioner in *DeCoteau v. District County Court*, was not completed in time for the State of South Dakota to receive a printed copy. As a result, the citations herein are to the final draft of the typewritten manuscript which was forwarded by counsel for Petitioner to the State of South Dakota.

However, to the extent that the specific holdings in *Seymour* and *Mattz*, in combination with certain dicta concerning the General Allotment Act as it related to settlement statutes in *general*, might have seemed to preclude this result in *general*, the State of South Dakota undertook what is admittedly a rather exhaustive compilation of documentation in support of its position, not only in *general*, but also as it specifically referred to the Lake Traverse Reservation. In light of the fact that Petitioner in *DeCoteau* now concedes that:

> In the period following the General Allotment Act, Act of February 8, 1887; c. 119, 24 Stat. 388, Federal Indian policy was directed toward the severance of tribal relations and the reduction of reservations
>
> . . . .

the legitimacy of this reconstruction, in terms of the *tenor* of the times is not in question. R.B.P. at 1, *DeCoteau*. Nor is the fact that the mere practice of allotment pursuant to the 1887 General Allotment Act, could *not* have accomplished this result even in issue. The extension of the trust period and subsequent definition of Indian Country in 1948 (18 U.S.C. 1151), effectively precluded disestablishment by this process alone, and the State of South Dakota has *never* questioned that in this respect most reservations are basically intact, insofar as the boundaries are concerned. Nevertheless, a special Act of Congress, passed pursuant to a separate provision of the General Allotment Act, which *was* intended to restore the lands so ceded to the public domain and effectively disestablish whatever exterior boundaries that were encompassing that land, *did* disestablish the reservation or portions thereof so affected.[2] The only question that remains is whether the 1891 Sisseton-Wahpeton Act can fairly be said to fit into this historical context. R.B.P. at 1, *DeCoteau*. If it can, the lands held in trust by the Federal Government for

2. Any position to the contrary would necessarily result in reservation boundaries within reservation boundaries within reservation boundaries, *ad infinitum*.

the Sisseton-Wahpeton Tribe today, would unquestionably be Indian Country (18 U.S.C. 1151 (c)) and as such, would still constitute a reservation—but the boundaries of the Lake Traverse Reservation as *originally* established in 1867 would no longer pertain. In essence, this has been the position of both the state and federal courts for over fifty years, insofar as this specific area is concerned. B.R. at 153-165, *DeCoteau*.

The State of South Dakota has presented this Court with probative evidence in unequivocal support of this same position. The fact that the Acts presented for construction in *Seymour* and *Mattz* did not, on their face or in their legislative history and surrounding circumstances, contain evidence of similar import, does not detract from the language of the Sisseton-Wahpeton Act nor the surrounding circumstances and legislative history thereof. The decision in the instant case does not have to conform to the specific *holdings* in *Seymour* and *Mattz*, which were presumably the result of the absence of this same probative evidence. It is in recognition of, and under this construction of the 1891 Act, that the Sisseton-Wahpeton Tribe has existed and prospered for the last eighty years.

For this Court to recognize that the 1867 exterior boundaries of the original Lake Traverse Reservation no longer exist would not, in any way, result in a "destruction" of the Tribe. The Federal Government would continue to assist the economic development of the Tribe, as it has in the past, and the State would urge it to do so. The Tribal Organization could continue to regulate the business and lives of the members of the same, insofar as such regulations related to areas of the original reservation that remain in trust. Such a holding would not affect these fundamental aspects of Tribal Government. It would, however, deter action similar to that of September 4, 1974, when, by the vote of six individuals, it was unilaterally declared that since the decision below recognizes that the boundaries of the original Lake Traverse Reservation still pertain, that this same Tribal Government has "*complete criminal and civil jurisdiction over all non-*

Indians" residing therein. Exec. Resolution No. 75-25 of Sept. 4, 1974, Sisseton-Wahpeton Sioux Tribe. Similarly, it would also prevent the requirement that these same non-members be "licensed," for the first time, as recently demanded by the Tribe, in order to continue to conduct their business in an area that has not been encompassed by the original boundaries of the Lake Traverse Reservation since 1892.

II

THE MAJOR ARGUMENTS ADVANCED IN FAVOR OF THE RECOGNITION OF THE ORIGINAL 1867 BOUNDARIES OF THE LAKE TRAVERSE RESERVATION DO NOT REFLECT THE LANGUAGE OF THE 1891 ACT OR THE LEGISLATIVE HISTORY AND SURROUNDING CIRCUMSTANCES THEREOF.

It has been the position of the State of South Dakota since this Court granted Certiorari on June 3, 1974, that it would welcome the contributions of any and all responsible parties

---

3. Petitions with over 15,000 signatures have been forwarded to the South Dakota Congressional Delegation protesting this action. Unfortunately, what the State termed a *remote* possibility less than three months ago in the *Brief for Respondent, DeCoteau*, has become very much a reality:

> Due Process under the 1968 Indian Civil Rights Act does not require court appointed counsel to defend the rights of indigents. No qualifications whatsoever are minimal to quality as "counsel" or "judge." While the right to a trial by jury is required by the terms of the Act, in practice even this basic right is ephemeral. When one also considers that in civil actions, the tribal courts will be the only courts wherein non-members can bring a cause of action against the members of any tribe, the qualifications of the tribal judiciary and limitations on the right to practice therein assumes a degree of additional significance. Even more so, the *remote possibility* of the assertion of criminal jurisdiction by the tribe over *non-member residents* who have no representation whatsoever in the Tribal Government raises enough constitutional and other issues to "boggle one's mind." B.R., N. 29 at 199, *DeCoteau* (emphasis added).

In addition to the Sisseton-Wahpeton Tribe, two other Tribes in South Dakota have enacted similar statutes and others are in the process of doing the same. When one considers that less than two years ago, the majority of these "non-members" never even dreamed they were "within" a reservation, the whole process approaches disbelief.

as *Amicus Curiae* and would itself submit any supplemental brief that this Court desired. B.P. at 74, 84, *Erickson*. B.R. at 71-72, 175, *DeCoteau*. A stipulation to this effect was filed in the Office of the Clerk. This position was assumed in recognition of the inherent difficulties presented by the necessity of having to reconstruct and interpret the language, legislative history, and surrounding circumstances of an Act of Congress passed over eighty years ago. The State has compiled and presented in its Briefs the legislative history and surrounding circumstances of the 1891 Act, and has discussed those provisions of the language of the Act and peripheral materials it deemed to be significant in a resolution of the issue. Included therein was the operative cession language of the Act, the "subject of the laws of the state" provision, the school land grant, the cartographic record, and numerous references in the *Congressional Record* and the Annual Reports of the Secretary of the Interior and Commissioner of Indian Affairs that specifically stated that the 1891 Act *would* and *did* restore 660,000 acres of land from the Lake Traverse Reservation to the public domain. In cooperation with the State of North Dakota, copies of these Briefs and Appendices were sent to the other states most directly affected, in order to determine whether they concurred in the analysis and arguments presented therein. Ten states replied that in their view, on the merits, the position of the State of South Dakota was soundly founded upon the language of the Act and the legislative history and surrounding circumstances. The Brief for the State of North Dakota, et al., as *Amici Curiae*, was thereafter submitted in response to this concurrence.

On the other hand, the Native American Rights Fund, on behalf of the Sisseton-Wahpeton Sioux Tribe as *Amicus Curiae*, the Arapahoe Tribe, the Three Affiliated Tribes and the Confederated Salish and Kootenai Tribes as *Amici Curiae*, and the United States as *Amicus Curiae*, submitted Briefs urging this Court to recognize the existence of the original 1867 Lake Traverse Reservation boundaries in the manner set forth in the Brief for Petitioner in *DeCoteau* and the Brief for Respondent in *Erickson*. An analysis of the

arguments common to each of these Briefs should be prefaced with what the State of South Dakota deems the most significant and salient characteristics of each: That is, a reluctance to squarely address or even recognize those areas of the Act and legislative history which are in irreconcilable conflict with the result this Court is urged to adopt, in addition to the rather conspicuous absence of citations to anything in the Act itself or the legislative history and surrounding circumstances thereof, that can fairly be said to support a position that Congress did not intend to effect the very result, which time and time again is documented in the material of the period.

A. The Holding of *Seymour* and *Mattz*. The State would submit that it is precisely because of the absence of any support of substance in the langauge of the Act or in the surrounding circumstances and legislative history thereof, that each and every brief submitted to date that urges a recognition of the original 1867 boundaries of the Lake Traverse Reservation does so in primary reliance on the hope that this Court will make a blanket application of the holding of *Seymour* or *Mattz*, without thoroughly examining the fact situation herein.[4] For example, "This Court should follow its *holdings* in *Seymour* and *Mattz*," R.B.P. at 13, *DeCoteau*.

In essence, the fact that this Court could not find probative evidence of an intent to restore to the public domain any portion of the Colville Reservation or the Klamath River Reservation in the situations presented in *Seymour* and *Mattz* is somehow supposed to be attributed to the language, legislative history, and surrounding circumstances of the 1891 Sisseton-Wahpeton Act. The very cases cited to support this position contain principles of construction which strongly dictate against such summary disposition of the nature thereby requested. The related pleas that any *result* other

4. A conservative estimate would be that approximately 95% of the arguments that have been advanced urging this Court to recognize the 1867 boundaries of the Lake Traverse Reservation are founded on materials and events subsequent to the date of the Act in question.

than that reached in *Seymour* and *Mattz* would necessarily mean overruling the same, have already been discussed and disposed of *supra*.[5]

B. The Public Domain. The extent to which the arguments in support of the existence of the original 1867 boundaries of the Lake Traverse Reservation are founded upon anything other than the 1891 Sisseton-Wahpeton Act and the legislative history and surrounding circumstances thereof, can most readily be demonstrated by the treatment accorded the concept of the public domain. The importance of this concept can hardly be questioned. It is almost axiomatic that any Act which restored land within the boundaries of any reservation to the public domain *necessarily* dissolved all exterior boundaries encompassing the same. In recognition of this fact, each and every Brief submitted in support of the original 1867 boundaries contains statements to the effect that the 1891 Sisseton-Wahpeton Act was *not* intended to restore the unallotted land within the 1867 boundaries of the reservation to the public domain. N.A.R.F. at 5, B.U.S. at 10, 14, 16, 17, R.B.P. at 5-6, *DeCoteau*, Brief for the Arapahoe Tribe, et al., at 16.

Although the Briefs submitted to date by the State of South Dakota contain no less than twelve direct references wherein Senator Dawes, the author of the General Allotment Act and the primary sponsor of the 1891 Act, various members of Congress, and the Annual Reports of the Secretary of the Interior and the Commissioner of Indian Affairs specifically and repeatedly stated that the 1891 Sisseton-Wahpeton Act *would* and *did* restore to the public domain approximately 660,000 acres from the Lake Traverse Reservation, not one paragraph in any of these Briefs contains so much as an indirect reference to this fact. B.R. at 7, 8, 45-46, 49, 55, 62, 63, 92, 97-98, *DeCoteau*, B.P. at 5, 46-47, 50, 56, 64, 68, *Erickson*. It is almost as if mere silence before this Court could obliterate the debates in the *Congressional Record* and the

5. Also, *See* B.R. at 179–184, *DeCoteau*.

effect specifically attributed to the 1891 Sisseton-Wahpeton Act in the Annual Reports of the Secretary of the Interior and Commissioner of Indian Affairs.

In addition, when one also considers the treatment accorded the school land grant, which was repeatedly stated to be subject to this same condition precedent in the enabling act, namely, that the "reservation shall have been extinguished and such lands be restored to, and become a part of the public domain," the silence on the specific references that the Sisseton-Wahpeton Act *would* and *did* restore the land thereby affected to the public domain becomes even more of an anomoly. Act of February 22, 1889, 25 Stat. 676. The substitute constructions presented by the United States and Petitioner in *DeCoteau*, as "plausible" alternatives to the condition precedent of the school land grant, do not detract from the absence of any discussion on this particular point.

C. The Operative Cession Language. The third area that receives essentially the same treatment in all of the Briefs submitted to date that urge this Court to recognize the original 1867 boundaries of the Lake Traverse Reservation is the operative cession language of the 1891 Sisseton-Wahpeton Act. The State of South Dakota has already pointed out the historical connotations, as well as the contemporary effect this language had on the boundaries of other reservations or portions thereof, in agreements ratified in the same bill as the Sisseton-Wahpeton Act. B.R., *DeCoteau*. The State of North Dakota, joined by ten other states, as *Amici Curiae*, substantiates this position and in addition has cited even more evidence in support thereof. Similarly, the fact that the United States inadvertently cited three cession statutes which undeniably disestablished portions of reservations, and with them their original exterior boundaries, as examples of similar "statutes ceding unalloted land" which purportedly could be "contrasted with statutes terminating reservations, or changing or diminishing their boundaries," has also previously been alluded to. Memorandum of the United States as *Amicus Curiae*, at 6. *See*, B.R. at 165-166, *DeCoteau*.

In the face of the total lack of other cession agreements on "all fours" with the language and method of payment utilized by Congress in the Sisseton-Wahpeton Agreement which could be cited as *not* disestablishing reservation boundaries or a portion thereof, the Briefs in support of a recognition of the original 1867 boundaries of the Lake Traverse Reservation have adopted another argument, though it too remains as untenable as the three previous examples cited by the United States for very much the same reason: The citation of earlier cases in which this Court ostensibly held that similar *cession* language did not affect the exterior boundaries of other reservations. An analysis of this argument reveals three distinct and very significant points. (1) The positions of the Briefs in this respect are not consistent, even in relation to each other. (2) In the decisions cited the issue now before this Court was not even presented. (3) The inference that the cession language did not disestablish the portion of the reservation thereby effected cannot be supported. The 1920 decision of *Ash Sheep Co. v. United States*, 252 U.S. 159 (1920), cited in the Brief for the Arapahoe Tribe, the Three Affiliated Tribes, and The Confederated Salish and Kootenai Tribes, as *Amici Curiae*, Brief for the United States as *Amicus Curiae*, and the Reply Brief for Petitioner, *DeCoteau*, demonstrates the irreconcilable inconsistencies inherent in this particular agrument.

With respect to the inconsistencies, the Brief for the Arapahoe Tribe, et al., as *Amici Curiae*, is founded upon the "significant distinctions" of various "settlement statutes" which center around the cession terminology, method of payment and the related degrees of fiduciary duties the *Amici* argue that the United States Government was therefore bound to abide by. The Brief clearly categorizes the 1904 Crow Act which was before the Court in *Ash Sheep*, as not in the same category as the Sisseton-Wahpeton "cession" statute, but rather as an example of an "express cession-in-trust" statute to which different "presumptions" apply. Brief

for Arapahoe Tribe, et al., at 10-11, 12. The United States *ignores* this very "significant distinction" and the position of the Reply Brief for Petitioner in *DeCoteau*, in this regard is entirely ambiguous. B.U.S. at 17-19, R.B.P. at 6-8, *DeCoteau*.

With respect to the second point, an examination of the *Ash Sheep* opinion reveals that while the fact situation involved the violation of a Federal statute relating to Indian lands, the question before the Court was essentially whether the Crow Tribe was entitled to any beneficial interests that might result from the portion of the reservation ceded *until* the land had been disposed of per the terms of the 1904 Act. The Court held that the Tribe was so entitled and specifically noted that:

> . . . until sales should be made, any benefits which ought to be derived from the use of the lands would belong to the beneficiaries, and not to the trustee, and that they did not become 'public lands' in the sense of being subject to sale or other disposition, under the General Land Laws. Union P.R. Co. v. Harris, 215 U.S. 386, 388, 54 L. ed. 246, 247, 30 Sup. Ct. Rep. 138. They were subject to sale by the government, to be sure, but in the manner and for the purposes provided for in the special agreement with the Indians, which was embodied in the Act of April 27, 1904 . . . . *Ash Sheep, supra* at 166.

The issue before this Court was not even before the Court in *Ash Sheep* opinion reveals that while the fact situation in*trust* arrangement for the disposal of the ceded land and subsequent payment to the Crow Indians involved, similar to that in *Seymour*, and most definitely distinguishable from the sum-certain arrangement in the instant case, as was pointed out by the Brief for Arapahoe Tribe, et al.

With respect to the final and most significant point, the fact that the lands so ceded in *Ash Sheep* were not in all respects "public land" pending disposition was no indication that they remained within the exterior boundaries of the Crow Reservation and were not a part of the *public domain* with respect to the issue in the instant case. The Briefs advocating a recognition of the original 1867 Lake Traverse boundaries have cited *Ash Sheep* as persuasive authority from this Court for the proposition that since the cession language therein did not extinguish the exterior boundaries of the Crow Reservation surrounding the ceded portion of the Crow Reservation, the cession language of the Sisseton-Wahpeton Act could not have accomplished that result in the Sisseton-Wahpeton situation. This argument was most succinctly advanced in the Brief for the United States, *Amicus Curiae*:

> That a 'cession' of unalloted land within a reservation does not of itself disestablish the reservation is supported by this Court's decision in *Ash Sheep Co. v. United States*, 252 U.S. 159 . . . While, in our case, jurisdiction rather than ownership is at issue, *Ash Sheep Co.* at least indicates that the use of the word 'cede' does not always imply a termination of the Indian-federal relationship as to the land 'ceded.' B.U.S. at 17-19.

Rather than "support" the position of the advocates of the original 1867 Lake Traverse Reservation boundaries, the 1904 Crow Act and the *Ash Sheep* opinion undermine the crux of their entire Briefs in this respect.

In another portion of the *Ash Sheep* opinion, the Court noted that:

> The agreement embodied in this act of Congress provided for a division of the Crow Indian Reservation in Montana on boundary lines which were described, and the lands involved in this case were within the part of the Reservation as to which the Indians, in terms, 'ceded, granted, and relinquished' to the United States all of their 'right, title, and interest.' *Ash Sheep, supra*, at 163.

The text of the Crow Act describes the new boundaries in no less than five separate provisions:

> ARTICLE IV. That for the purpose of segregating the ceded lands from the diminished reservation the new boundary lines described in Article I of this

agreement shall, when necessary be properly surveyed and permanently marked in a plain and substantial manner by prominent and durable monuments, the cost of said survey to be paid by the United States. 33 Stat. 352, 355.

'ART. IV. That for the purpose of segregating the ceded lands from the diminished reservation the new boundary lines described in Article I of this agreement shall, when necessary, be properly surveyed and permanently marked in a plain and substantial manner by prominent and durable monuments, the cost of said survey to be paid by the United States. 33 Stat. 352, 359.

'ART VIII. The right to take out water upon the diminished reservation subject to any prior claim of the Indians thereto by reason of previous appropriation, and the right to construct, maintain, and operate dams, flumes, and canals upon and across the said diminished reservation for the purpose of irrigating lands within any portion of the ceded tract are hereby granted, such rights to be exercised by persons, companies, or corporations under such rules, regulations, and requirements as may be prescribed by the Secretary of the Interior. 33 Stat. 352, 359.

SEC. 3. That for the purpose of surveying and marking so much of the boundary line of the tract ceded and relinquished by the Indians as may be necessary to segregate the same from the lands reserved by them, as provided in article four of said agreement, the sum of one thousand two hundred dollars, or so much thereof as may be necessary, be, and the same is hereby, appropriated out of any money in the Treasury not otherwise appropriated, the sum of forty thousand dollars, or so much thereof as may be necessary, for the completion of the survey and subdivision of said ceded lands, the same to be reimbursed out of the first moneys to be received from the sale of said lands.

SEC. 4. That the Commissioner of Indian Affairs shall cause allotments to be made, in manner and quantity as provided by existing law, of the lands occupied and cultivated by any Indians on the portion of the reservation by said agreement ceded and relinquished, as required by article three thereof; and where such Indian occupants elect to remove to the diminished reservation he shall cause a schedule to be prepared showing the names of such occupants, the descriptions of the lands, and the character of the improvements thereon . . . 33 Stat. 352, 359.

The Secretary of the Interior shall fix a reasonable time within which such Indian occupants shall elect whether they will remain on the ceded tract or remove to the diminished reservation, and where they elect to remove he shall also fix a reasonable time within which such occupants must remove their improvements if they should choose to do so instead of having the same appraised and sold. 33 Stat. 352, 360.

In short, the exterior boundaries once encompassing the *ceded* area were automatically disestablished in precisely the same manner as the exterior boundaries of the original Lake Traverse Reservation, with the allotments therein also thrust onto the newly created public domain. The ceded lands, while not public lands for all purposes prior to actual settlement and entry, because of the peculiar trust arrangements therein, were most definitely made a part of the public domain— and without the public domain language on the face of the Act, argued by some to be a *sine qua non* of disestablishment.[6] But for the fact that the 1904 Crow opening, similar to the 1891 partial Crow opening discussed in detail in the Brief for Respondent, *DeCoteau*, only encompassed part of the Crow Reservation which thus *necessitated the new boundary discussion*, the effect of the 1904 Act on the exterior boundaries of the reservation would have been *truly* susceptible to the same sophisticated arguments of those who advocate that the original 1867 boundaries of the Lake Traverse Reservation remain as established in 1867.

The type of analysis that renders the *Ash Sheep* argument untenable with respect to the issue in the instant case, could similarly be utilized to demonstrate that *United States v.*

---

6. This construction of the 1904 Crow Act was confirmed via a telephone conversation on October 3, 1974, with Mr. N.A. MacKenzie of the Bureau of Indian Affairs, Realty Division, located with the Crow Tribe in Harden, Montana. Mr. MacKenzie stated that the Bureau has always recognized the boundaries of the Crow Reservation as diminished by the 1904 Act.

Brindle, 110 U.S. 688 (1884), or any other decision of this Court near the turn of the century, is equally unpersuasive in this respect, but this is not the point. These decisions were not concerned with the issue now before this Court and, other than *United States v. Pelican*, 232 U.S. 442 (1914), *Seymour*, *supra*, and *Mattz*, *supra*, the State of South Dakota is not aware of any other decisions that were. Rather, all of the foregoing should conclusively establish something other than the fact that the advocates of the continued existence of the 1867 Lake Traverse Reservation boundaries could not provide this Court with even one Act legitimately on "all fours" with the Sisseton-Wahpeton sum-certain cession Act which did not disestablish a reservation or a portion thereof in precisely the same manner that the State of South Dakota now urges this Court to recognize. Namely, that the language of each Act and the surrounding circumstances and legislative history thereof must be independently examined in its proper historical perspective. Generalizations which are not soundly founded upon the documents of the period, and which do not reflect the tenor of the times, eventually destroy the very premises they are urged to support.

D. A Congressional Recognition. Both the Reply Brief for Petitioner in *DeCoteau*, and the Brief for the United States, *Amicus Curiae*, contain citations to certain phrases within recent legislation which are stated to stand for the proposition that Congress:

> Reaffirmed its consistent recognition of the Lake Traverse Reservation . . . .
> Confirmed that the Lake Traverse Reservation boundaries are today identical to those established by the Treaty of February 18, 1867 . . . . R.B.P. a 2-3, *DeCoteau*.
> Reaffirmed its view that the opening of the suprlus lands to non-Indian settlement did not terminate or diminish the Reservation . . . a clear indication of the congressional understanding that the Reservation was never abolished and always included non-trust land . . . .
> A recognition of the Reservation's existence beyond trust lands and its continued service as the home and political jurisdiction of the Sisseton-Wahpeton Tribe. B.U.S. at 27, 28.

Although the concession is made in the Brief for United States that "these recent acts are not determinative of an earlier congressional intent," which is, after all, *the* issue here, nevertheless it is maintained that they are "consistent *only* with the continuity of the Reservation's original boundaries and should be given weight." B.U.S. at 28 (emphasis added). Even to this limited extent, the State of South Dakota cannot agree.

On November 26, 1974, an inquiry was directed to each and every sponsor of the 1974 Acts in question, requesting a clarification as to the intent of Congress insofar as it related to the proposition for which the certain phrases in the Acts were being cited to this Court. Without exception, the sponsors of the legislation *emphatically* and *unequivocally* stated that this was *not* within the scope or purpose of the bills, and that at no time was the issue before this Court discussed, considered, or even mentioned during the pendency of the legislation. The full text of these responses is set forth as Appendices A, B, C, D, *infra*.

The purpose of one Act, P.L. 93-489 (1974), was simply to declare that ninety acres of federally owned land would be held in trust for the Sisseton-Wahpeton Tribe. The other Act, P.L. 93-491 (1974), was passed in order to allow the Tribe to consolidate its land holdings and eliminate the fractional heirship problem which is prevelant whenever Indian land has been held in trust by the United States for a period of years. In essence, both Acts represent nothing other than a commendable effort by the South Dakota Congressional Delegation to assist the Sisseton-Wahpeton Tribe. It is indeed unfortunate that this assistance should be seized upon and cited to this Court as probative evidence of a *formal congressional recognition* that the 1891 Act did not alter the boundaries of the original 1867 Reservation — simply because a natural, convenient, and shorthand method was used to describe the area in question, which had nothing

whatsoever to do with the purpose or the scope of the legislation.

Although the original source of the description could not be ascertained in the time available for its discovery, the entire incident fits squarely within the discussion of similar phrases and prepositions which have appeared in other acts dealing with other areas which were once "reservations," but were unquestionably disestablished and restored to the public domain. *See*, Appendix A and B.R. at 142-148, *DeCoteau*. In addition, it is representative of the extent to which the advocates of the 1867 boundaries have had to rely upon *any* source other than the documents of the period in question, in an attempt to refute the intent of Congress which is paramount therein.

E. The Law and Order Argument. The last general area remaining to be discussed centers around the assertions that if this Court recognizes the position of the State of South Dakota, there will be no law and order in the area in question, and chaos will prevail. N.A.R.F. at 4-5, B.U.S. at 11, 29, Brief for the Arapahoe Tribe, et al., at 16-17, R.B.P. at 10, *DeCoteau*.

It is understandable that counsel from Colorado, Washington, D.C., and New York, who are far removed from the area in question might suffer under this illusion, but for the United States Government, who has an obligation to all of the citizens of this country, to maintain that such a result would be "destructive of law and order" is inexcusable. B.U.S. at 11.

If, in the preparation of its Brief to this Court, the Office of the Solicitor General would have contacted those branches within the Federal Government more directly involved with the fact situation in South Dakota, such as the Indian Civil Rights Division of the Justice Department, or the local Office of the United States Attorney, the State of South Dakota sincerely believes this argument would *never* have been advanced. The repeated requests from the Federal Government to the State of South Dakota for a workable cross-deputization pact to prevent a complete break-down in law

and order brought about by the jurisdictional ramifications of several Federal Court decisions which recently *adopted the very result* urged in the Brief for the United States, aptly illustrates this precise point. With specific reference to the Sisseton-Wahpeton Tribe, one department of the Federal Government is requesting this Court, on the basis of a law and order policy argument, to reestablish the original boundaries of the Lake Traverse Reservation. At the same time, different agencies of the Federal Government, including the Indian Civil Rights Division of the Justice Department, the Bureau of Indian Affairs and the United States Attorney's Office, are asking the State of South Dakota to cooperate with them and this same tribe, within this same area, to prevent a complete break-down in law and order brought about by the very decision the United States is asking this Court to affirm: *United States ex rel. Feather v. Erickson*, 489 F.2d 99 (CA 8 1973).

While the State of South Dakota is admittedly disappointed that the United States could not agree with the position of the State on the merits of the issue of congressional intent, it is even more concerned that the policy arguments presented in the Brief for the United States at least reflect the *reality* of the situation. Efforts are now being made, through the Office of the Governor of the State of South Dakota, to bring this particular point to the attention of Attorney General Saxbe, but it is doubtful that the matter can be satisfactorily resolved before the date set for oral arguments.

In any event, it is beyond question that there is no reason to assume that the effective and established system which has administered law enforcement in this area of the State for over eighty years, could not continue to do so in the same fair and impartial manner. The checkerboard problem cited by the United States is non-existent for all practical purposes, as the Brief for Respondent at 191, 196-198, *DeCoteau*, initially pointed out. While trust land does constitute approximately 15 percent of the total land base of the area in question, only

1.5 percent of this land is actually resided upon or farmed by members of the Sisseton-Wahpeton Tribe. As a result, over ninety percent of the crimes committed by members of the Sisseton-Wahpeton Tribe, misdemeanors and felonies alike, occur in areas where the status of the land is not, for all practical purposes, even an issue. Compared to the problems which have occurred since the resurrection of the original 1867 boundaries by the Eighth Circuit Court of Appeals, the inconvenience of resorting to the "tract books" in a very limited number of cases would not be worth mentioning.

According to the United States Census of 1970, in addition to the 2,087 members of the Sisseton-Wahpeton Tribe, there are 54,501 non-member residents of the State of South Dakota living within the same five counties which would be, in whole or in part, encompassed by the original boundaries of the 1867 Lake Traverse Reservation. The fact that the Sisseton-Wahpeton Tribe, in 1974, *after* the decision of the Eighth Circuit in *United States ex rel. Feather v. Erickson, supra*, established a Tribal Court and a Tribal Code does not alter the geographical distribution of the member and non-member population, and any assumption that such a system could, even in the *foreseeable* future, adequately insure the protection of the lives and property of *all* the residents, under these circumstances, is simply not founded upon an objective appraisal of the problems inherent in such a reconstruction.[7]

7. Although the United States variously describes the Sisseton-Wahpeton Tribe as a "major Indian Tribe" (B.U.S. at 9), and a "populous Indian tribe" (B.U.S. at 29), some of the population estimates presented to this Court would seem to be in considerable excess of those stated in the 1970 United States Census. In this respect, it is interesting to note that there were only 600 members of the Sisseton-Wahpeton Tribe that voted in the 1974 Tribal Election.

8. The law and order problem within those areas of South Dakota that have always been designated as reservations is also reaching a near crisis level. Since this Court's attention was initially directed to the lesser dif-

[footnote continued]

III

SOME ARGUMENTS ADVANCED IN FAVOR OF THE RECOGNITION OF THE ORIGINAL 1867 BOUNDARIES OF THE LAKE TRAVERSE RESERVATION ACTUALLY SUPPORT THE POSITION OF THE STATE OF SOUTH DAKOTA.

Some of the Briefs of the proponents of the 1867 boundaries contain certain elements which cannot be treated collectively. In recognition of this fact, the following summary analysis is intended as a reply.

A. Brief for the Arapahoe Tribe, The Three Affiliated Tribes and The Confederated Salish and Kootenai Tribes, *Amici Curiae*. To the extent that this Brief recognizes what it terms certain "significant distinctions" between the 1891 Sisseton-Wahpeton "cession" statute and the Acts construed in *Seymour* and *Mattz*, and cautions this Court to carefully consider the provisions of a "cession" statute in the "clarifying light of its legislative history and surrounding circumstances and discern therefrom the Congressional intent," because in this case "no presumption arises in favor either of disestablishment or continuing reservation status," the State of South Dakota commends the efforts of the counsel involved. Brief for Arapahoe Tribe, et al., at 4, 12.

Similarly, another indication of the merits of the position of the State in this particular case can also be inferred from

[footnote continued from previous page]

ficulties of the month of August, 1974, (B.R. at 197-200, *DeCoteau*), there have been no less than five state-wide meetings on these and related issues. *See*, N.3 *supra*. Senator James Abourezk, Chairman of the Senate Sub-Committee on Indian Affairs, chaired the most recent session at Rapid City, South Dakota, on November 30, 1974, with over 500 individuals in attendance.

Although increased political factionism within the Tribal Organizations, with certain militant overtones, is undoubtedly one of the underlying reasons that the Tribal Police have not been able to cope with the rising intratribal violence, the teachings of the past would seem to point to certain basic defects within the multistructured jurisdictional system that exists therein. In addition, for all practical purposes, the Federal Government has never provided adequate law enforcement protection in any of these areas within the State of South Dakota — and the State is powerless to do so.

the alternative nature of the argument presented therein: Namely, a concession that, at worst, the legislative history and surrounding circumstances "can be cited as support for either disestablishment or continuing reservation status." Brief for Arapahoe Tribe, et al., at 21. In this respect, perhaps the most candid statement to date in any of the Briefs advocating the existence of the original 1867 boundaries of the Lake Traverse Reservation appears in the prefatory "STATEMENT OF INTEREST," wherein counsel advises this Court of the "significant distinctions" in the event the Court "does not adopt the position of respondent Indians in this case." Brief for Arapahoe Tribe, et al., at 4.

The most unequivocal, although admittedly inadvertent, support this proponent for the 1867 boundaries renders to the position of the State of South Dakota is the fact that, in the entire repertoire of settlement statutes cited in this Brief, the *Amici* could not cite to this Court even one "cession" statute of the Sisseton-Wahpeton type that did *not* disestablish and dissolve the exterior boundaries of a reservation or the portion thereof so affected. In light of the conceded effect of the other "cession" agreements on the boundaries of the reservations which were ratified in the same Act as the Sisseton-Wahpeton Agreement, this fact assumes a degree of additional significance.

B. Reply Brief for Petitioner, *DeCoteau*. The Reply Brief for Petitioner states that the use of the term "former reservation" in the documents cited by the State in the Brief for Respondent was "merely descriptive of the reservation lands opened for settlement." R.B.P. at 4, *DeCoteau*. This was precisely the point. The lands opened to settlement were no longer within the boundaries of the Lake Traverse Reservation because they had been restored to the public domain and hence were referred to as "formerly" within the Lake Traverse Reservation. Whether one prefers "former Sisseton Indian Reservation" or "former Lake Traverse Reservation," the State would submit that the phrase is susceptible of only one interpretation — especially when one also considers the

other evidence that the area in question was in fact restored to the public domain, such as the express statements to this effect by the members of Congress, and the unequivocal confirmation by the Commissioner of Indian Affairs and the Secretary of the Interior, in their Annual Reports, that 660,000 acres from the Lake Traverse Reservation had been restored to the public domain by the Act of March 3, 1891.

The fact that only nine such references were cited to the Court by the State, contrary to the implication in the Reply Brief for Petitioner, should not be so construed as to indicate that the list was exhaustive of each and every "former" reference available. As was initially pointed out in the Brief for Respondent, the same "former" designation appears in hundreds of other miscellaneous sources on file in the National Archives, Civil Division, Washington, D.C. B.R. at 8, *DeCoteau*. It was simply the opinion of the State that the point could be made with nine such references, spanning from 1891 to 1918, and authored by everyone from the Commissioner of Indian Affairs to the Chairman of the House Committee on Indian Affairs, as well as it could with ninety or nine hundred.

The Official Maps of the Office of Indian Affairs "showing" Indian Reservations within the United States, appended each year to the Annual Report of the Commissioner of Indian Affairs which were discussed at length in the Brief for Respondent, also support this construction. B.R. at 113-116, *DeCoteau*. The unequivocal removal of the Lake Traverse Reservation from the same maps immediately after the passage of the 1891 Sisseton-Wahpeton Act, and its designation as a "former" reservation some twenty-five years later, graphically illustrate this very point.[9]

Whatever assistance Petitioner hoped to gain from the fact that this same "former" designation appeared in the Senate

---

9. Complete sets of these maps from the period of 1880-1920 were reproduced by the Library of Congress at the request of the State of South Dakota. Ten sets were lodged with the Office of the Clerk and two sets were supplied to opposing counsel.

and House Reports on the claims award of the Sisseton-Wahpeton in 1972, with other references which are purportedly evidence of a contrary nature, is more than negated by the learned opinion of the attorney who represented the Sisseton-Wahpeton Tribe before the Court of Claims. In 1972, Marvin J. Sonosky, of acknowledged expertise in this particular area of "settlement statutes," took the position, both in 18 N.Dak.L. Rev. 581, and before the Supreme Court of South Dakota in *State v. Molash*, 86 S.D. 558, 199 N.W.2d 591 (1972), that while *Seymour* was persuasive authority for *certain* settlement statutes, it did not include those situations, such as the cession of the Sisseton-Wahpeton Act, which *did* effectively disestablish the Lake Traverse Reservation in precisely the manner the State of South Dakota now urges this Court to recognize.[10]

Insofar as the repeated assertions that since 1867 everyone has administered the Lake Traverse Reservation as defined in the 1867 Treaty are concerned, the Brief for Respondent is replete with evidence to the contrary. In this instance, as in the case of the hypothetical "constructions" which are offered as alternatives to what is stated in the enabling act admitting the State of South Dakota to the Union, and in the Senate and House Reports and *Congressional Record*, to be the *reason for* and the *condition precedent* to the school land grant, the position of Petitioner, while it might be "plausible," is in irreconcilable conflict with express statements and action to the contrary.[11]

---

10. Mr. Sonosky is currently representing the Rosebud Sioux Tribe in *Rosebud Sioux Tribe v. Kneip, et al.*, No. 74-1211 (CA8, pending). See App. III, IV, B.R., *DeCoteau*. The then unpublished opinion of the Hon. Judge Andrew W. Bogue, United States District Court, District of South Dakota, which was set forth in App. III at 143, *DeCoteau*, can now be cited as *Rosebud Sioux Tribe v. Kneip, et al.*, 375 F. Supp. 1065 (1974).

---

11. In addition to the materials discussed at length in B.R. at 132-140, *DeCoteau*, the identical reasons for the school land grant also appear in the legislative history of the 1910 Act (36 Stat. 440) which "opened" one county

[footnote continued]

C. Brief for the United States, as *Amicus Curiae*. After having had over two months to respond, one could logically have expected that if any Brief should have squarely met each and every major argument of the State of South Dakota, it would have been the Brief for the United States as *Amicus Curiae*. However, as in all other instances, there is no reply to the remarks of Senator Dawes and the other congressmen that the area in question was to be restored to the public domain, or to the unequivocal confirmation of this fact in the Annual Reports of the Secretary of the Interior and the Commissioner of Indian Affairs that the Act in question *would* and *did* restore 660,000 acres to the public domain from the Lake Traverse Reservation. Nor does the United States even mention the fact that the same Act which ratified the Sisseton-Wahpeton Agreement restored approximately *seven million (7,000,000)* acres of land to the public domain by the ratification of six other agreements that disestablished each and every reservation or portion thereof effected, in precisely

---

[footnote continued from previous page]

of the Pine Ridge Reservation in South Dakota:

> Mr. GAMBLE. I may say in reply, Mr. President, referring to the enabling act providing for the admission of North and South Dakota, Montana, and Washington, that sections 16 and 36 in each township were granted to the separate States in each State for the benefit of the common schools; but in the States where there were Indian reservations, it provided that the grant should not take effect until the lands were opened to settlement, *or, in other words, became a part of the public domain. By the passage of the bill in question the lands so opened become a part of the public domain and open to settlement*, and the grant in the enabling act becomes immediately operative and conveys sections 16 and 36 in each township to the State. That was a contract between the Government and the several States as provided by the act of admission. The State of South Dakota is clearly entitled to the school lands, free from any charge to the State. 45 Cong. Rec. 1502 (1910) (emphasis added).

Although the enabling act for the State of Washington was said to be identical to that of South Dakota, it is interesting to note that the 1906 Colville Act (34 Stat. 80) presented in *Seymour v. Superintendent*, 368 U.S. 351 (1962), did *not* contain the school land grant and neither did the 1892 Klamath River Act (27 Stat. 52) construed in *Mattz v. Arnett*, 412 U.S. 481 (1973). *See*, B.R. at 179-184, *DeCoteau*.

the same manner that the State of South Dakota is now urging this Court to recognize. As *Amicus Curiae* to this Court, the United States does not bother to respond to the fact that the decision below created a conflict between the Circuits, in addition to overruling the established precedent within the Eighth Circuit. The analysis of the Tenth Circuit, through the viability of *Ellis v. Page*, 351F.2d 250 (CA 10 1965), *aff'g Ellis v. State*, 386 P.2d 326 (Okl.Cr. 1963), which directly or by innuendo declares the *non-reservation* status of the western one-half of Oklahoma and untold other areas, is certainly deserving of at least a cursory recognition of some sort.[12]

The arguments that are advanced do not readily lend themselves to analysis: "former" reservation does not really mean "former" reservation (B.U.S., N.8 at 26), "subject to the laws of the state" does not really mean "subject to the laws of the state" (B.U.S. at 21), and the school land grant was not really premised on the condition precedent in the enabling act that the reservation be extinguished and the lands restored to the public domain, as the House and Senate Reports and the *Congressional Record*, time and time again reiterate, but rather was somehow related to another statute passed four years *after* the Sisseton-Wahpeton Act, which was never mentioned in conjunction with any school land grant to the State of South Dakota. B.U.S., N. 8 at 21.

Moreover, even after it was pointed out that the Proclamations "opening" other reservations which unquestionably were disestablished, described the land in question as "on," "in" or "within" the reservations so opened, the United States still maintains that the same prepositional phrases within the Sisseton-Wahpeton Proclamation con-

12. Other than the decision below, the State of South Dakota is not aware of any decision in any Circuit that conflicts with either *DeMarrias v. State of South Dakota*, 319 F.2d 845 (CA 8 1963) or *Ellis v. Page*, 351 F.2d 250 (CA 10 1965) insofar as the construction of similar *cession* agreements is concerned. It would be impossible to determine the precise land base that is declared to be of a "non-reservation" status under the purview of these two cases.

stitute "the most important administrative interpretation of the 1891 Act." B.U.S. at 22. Along these same lines, the State specifically set forth *Land Decisions* (B.R. at 147, *DeCoteau*) which described the ceded area of the Great Sioux Reservation in precisely the same manner as the Decisions cited initially in the Brief for Petitioner, *DeCoteau*. Yet the Brief for the United States nevertheless still includes these same citations under the subheading that "SUBSEQUENT ADMINISTRATIVE AND LEGISLATIVE ACTIONS CONFIRM THAT THE 1891 ACT DID NOT DISESTABLISH THE 1867 TREATY BOUNDARIES." B.U.S. at 22-23. Indeed, most of the affirmative arguments of the United States, in this respect, could be similarly documented to resurrect the boundaries of reservations that were specifically and unquestionably disestablished on the face of any one of a number of different statutes.

In summary, in light of the three statutes that *disestablished* reservations, cited as examples of homesteading "within reservation boundaries" in the earlier Memorandum for the United States, and the *Ash Sheep* cession argument, which flies in the face of the 1904 Crow Act construed therein, the State of South Dakota still deems the position of the United States in *DeMarrias v. State of South Dakota*, 319 F.2d 845 (CA 8 1963), that the 1891 Sisseton-Wahpeton Act disestablished the Lake Traverse Reservation by restoring all the unallotted land therein to the public domain, substantially more persuasive. B.R. at 165-166, *DeCoteau*.

D. The Arguments of Substance. In conjunction with the Brief for Respondent, submitted in *DeCoteau v. District County Court*, No. 73-1148, the State of South Dakota has attempted to at least address the merits of *all* of the substantive arguments advanced to date in the Briefs advocating a recognition of the original boundaries of the 1867 Lake Traverse Reservation. The failure to do so in any particular instance can in good faith be attributed to mere inadvertence and can be clarified at the time set for oral argument.

IV

THE BACKGROUND OF THE GENERAL ALLOTMENT ACT IS CONSONANT WITH THE POSITION OF THE STATE OF SOUTH DAKOTA.

In both the Brief for Petitioner, *Erickson*, and the Brief for Respondent, *DeCoteau*, the State of South Dakota offered the suggestion that additional research into the legislative history of the General Allotment Act would undoubtedly be of some assistance to this Court in resolving the very difficult question that has been presented. B.P. at 73-74, *Feather*, B.R. at 71-72, *DeCoteau*. Although the entire task could not be completed in time for a formal presentation by way of written motion and in the form of a separate Brief, the State has substantially completed a summary examination of the legislative history of the Act from its origins in 1879 through enactment in 1887. Act of February 8, 1887, 24 Stat. 388.

Very few passages in the House and Senate Reports or in the entire *Congressional Record* were actually addressed to the precise issue before this Court. However, the *tenor* of the entire proceeding is wholly and unequivocally in support of the position of the State of South Dakota. As the *Congressional Record* reflects, it was almost as if Congress assumed that posterity would know the effect any statute dealing with the cession or sale of a portion of any Indian reservation would necessarily have on the status of the lands so sold or ceded and on the exterior boundaries encompassing the same.

While not replete with such passages, the following statement of Senator Dolph of Oregon, is the most representative and singularly comprehensive explanation of this aspect of the Act that the State of South Dakota was able to locate in the entire *Congressional Record*:

> Mr. DOLPH. The policy of the Government for a long time past has been to put the Indians upon reservations and to purchase the title to the lands formerly held by them; until now they are confined to reservations mainly in the Western States and the Territories. The bill proposes a radical change in the Indian policy. It proposes to authorize the President in his discretion at any time to allot the lands in these reservations in severalty to the Indians located thereon in certain quanitities, and authorizes the purchase of the balance of the reservations by the General Government through the Secretary of the Interior.
>
> At the present time, or at least in 1880, which is the date of the last statistics I happen to have, the total number of Indian reservations in the United States was 147. Those reservations contained 154,436,362 acres. The estimated Indian population at that date was 255,998, which gave about 603.40 acres of land to each Indian. *After purchase of the right of occupancy from the Indians and setting aside portions of the reservations to be held by them in severalty under the operation of this bill, I suppose that something over two-thirds of the area of the present Indian reservations will be restored to the public domain, amounting to over 100,000,000 acres.* 15 *Cong. Rec.* 2277 (1884) (emphasis added).

Earlier remarks by Senators Coke and Morgan reflect the import of the above passage, though in less unequivocal terms:

> Mr. COKE. . . . The theory of the bill in the minds of the members of the committee, I am satisfied, is that the money which may be produced by a sale to the Government of the lands not allotted is necessary to aid the Indians in improving their severalty allotments and otherwise supporting them. I object to the amendment because it seems to anticipate that the Indians may take in severalty just what they want, *and keep the other locked up as a reservation not sold to the Government*, when it is the intention of the bill, when one of the main objects sought to be attained by the bill is to *break up these great reservations*, which lock up vast sections of valuable country from occupancy and from cultivation. That is one of the great objects of the bill. The fact that these reservations do exist, that Indians are protected upon them, and that the whites will intrude upon them, has been the cause of much the greater number of our Indian wars. We desire to get that prolific cause of trouble out of the way. We desire to provide the Indian with all the

land he possibly needs, that his stock can graze upon, out of his reservation, and for the *rest of it we desire to pay him a fair price and have it belong to the Government*. 11 Cong. Rec. 909 (1881) (emphasis added).

> Mr. Morgan. . . . I do not believe there is a lawyer in the United States who upon a careful examination and consideration of this bill would differ with me upon that proposition in connection with it. Here is a grant of land made by act of Congress and by treaty to the Indians and they hold and occupy it until Congress shall otherwise direct, and Congress comes in and says that it will not otherwise direct until two-thirds of the male members of each tribe shall consent that it shall otherwise direct. Putting these enactments together and considering them *in pari materia*, it seems to me to be impossible to hold otherwise than that this is a proclamation of a grant to the Indians in perpetuity *until such time as two-thirds of the male members of each Indian tribe entitled to a reservation shall give their consent to give it up*. 11 *Cong. Rec.* 1000 (1881) (emphasis added).

Later, on February 18, 1886, Senator Dawes succinctly put the issue in a proper perspective.

> Mr. DAWES. . . . Further on in the bill it also authorizes the Secretary of the Interior to take up all three classes of reservations, the treaty reservation, the statute reservation, and the executive-order reservation, and by negotiation or otherwise to *reduce the limits* and open up to the public all those parts of those reservations not necessary for the purpose of maintaining upon the reservation such of these Indians as in his opinion he can not wisely put out upon the land.
>
> . . . I supposed that the bill would make a very *great advance in the reduction of all reservations*, treaty, statute, and executive-order reservations, because for the first time it clothes our officials with power to take up each one of these reservations, and, in the light of the present day, and of the present condition of the Indians and of the soil, *to cut it down to present necessities*. All that, by the amendment of the Senator from Kansas, will be stricken out of this bill, and this will be a bill only to treat with the Indians upon the treaty and statute reservations. 17 *Cong. Rec.* 1630, 1631 (1886) (emphasis added).[13]

In short, what was termed the "Chinese Wall" was to be broken down and entirely eradicated.

> . . . Individual rights, action, and responsibility can only work this change in the condition of the Indian; he must no longer be surrounded by a "Chinese wall." The bill contains other provisions by which the United States may, with consent of Congress, secure title to all lands not thus allotted in severalty. H.R. Rep. No. 2247, 48th Cong., 2nd Sess. 1 (1885).

The work of D. S. Otis, *The Dawes Act And The Allotment of Indian Lands*, 5-7 (1972 Edition) is a convenient source of some of the citations to the legislative history of the Dawes Act. In certain specific instances even the text supports the position of the State. *See* pp. 17, 19, 32, 87, 141-142.

More importantly, however, the text contains citations that the State had overlooked to other documents such as the Annual Reports of Board of Indian Commissioners which specifically and unequivocally buttress the substance of what is contained in the Annual Reports of the Secretary of the Interior and Commissioner of Indian Affairs, *supra*, in conjunction with the discussion of the 1887 Act.

With specific reference to the 1891 Sisseton-Wahpeton Act, the 1891 Report of the Board concludes that:

> The work of allotting lands in severalty to Indians and securing to them separate homesteads has been continued, and we see no reason to doubt the wisdom of the policy. During the year 2,104

---

13. In other portions of the debate, "to cut it down to present necessities" was variously referred to as the "sales of their reservation" or the process whereby the remainder of the area in question was the "residue of the reservation sold." 18 *Cong. Rec.* 974 (1887).

> patents have been issued and 2,830 allotments have been approved and the issuance of patents directed. Already more than 16,000 Indians have become citizens of the United States, and about 4,000 more, by taking allotments, are soon to become citizens. Adding the 7,610 in Oklahoma who have received allotments under agreements ratified by the last Congress, we have a total of 27,610 Indian American citizens, subject to the same laws and entitled to the same privileges as other citizens; and they have *surrendered to the United States about 23,000,000 acres, which have become a part of the public domain and open for settlement and improvement.* Report of the Board of Indian Commissioners, 7, (1891) (emphasis added).

The Appendix thereto contains similar statements of Gen. E. Whittlesey, the chief negotiator of the 1891 Sisseton-Wahpeton Act, Merrill E. Gates, the President of the Board, the Commissioner of Indian Affairs, the Hon. Thomas J. Morgan:

> General Whittlesey. . . . Two years ago there were, counting all the little Mission Indian reservations in Southern California as one, and all the Pueblos in New Mexico as one, 138 reservations, comprising 104,314,349 acres of land. During the year 1890 these reservations were reduced to the amount of 12,000,000 acres, and during 1891 they have been *reduced* 8,000,000 more. I quote round numbers only. *So something over 20,000,000 acres have been cut off from reservations and added to the public domain, and these have been, or are soon to be, thrown open to the settlement of whites.*

> President Gates. . . . The vast domain of land occupied by the Indians must be cut up. If we remember that 104,000,000 of acres of land (a territory two-thirds as large as that of France or

> Spain) are held by the Indians in nominal occupancy, we shall see that before titles to that land should be confirmed to the Indians forever to be held by them to rove over while the game they used to hunt has disappeared, we need to consider what is true tenure of land — what gives a title to land. Let no one understand me as opposed to giving compensation for unused land which we take by agreement from the Indians. *They can not hold all this land perpetually outside the sphere of civilization. Twenty-one million acres out of the 125,000,000 with the assent of the Indians, have been put back into the public domain and opened to settlers within the last three years.*

> Mr. MORGAN. . . . There is growth in public sentiment; there has been progress in legislation and in determining more accurately, by the progress of legislation, on a settled policy of administration. We understand more clearly than ever before what the Government is attempting to do for the Indians. *The Indians themselves are coming to understand that the reservations are to be reduced and the surplus is to be restored to the public domains;* that their lands are to be alloted in severalty, and that they are to be treated as individuals and not as tribes; that they are to be citizens of the United States, and that they are to adjust themselves to the conditions thus forced upon them. Report of the Board of Indian Commissioners, 51, 124, 133 (1891) (emphasis added).

It is the position of the State of South Dakota that the language of the 1891 Sisseton-Wahpeton Act, and the legislative history and surrounding circumstances thereof, are sufficiently persuasive in their entirely to be determinative of the issue which has been presented. The background of the General Allotment Act is wholly consonant with this position. The material set forth above is intended only to reply to the inference to the contrary in some of the Briefs submitted to date.

CONCLUSION

It is respectfully submitted that the ruling of the Eighth Circuit Court of Appeals is erroneous. It should be reversed and that court instructed to deny Respondents' applications for writs of habeas corpus.

Respectfully submitted,

KERMIT A. SANDE
Attorney General of South Dakota

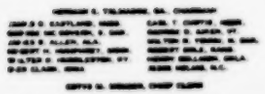
WALTER W. ANDRE
Assistant Attorney General

TOM D. TOBIN
Special Assistant Attorney General

Attorneys for Petitioner

December 1974

APPENDIX A



United States Senate

COMMITTEE ON
AGRICULTURE AND FORESTRY
WASHINGTON, D.C. 20510

December 5, 1974

Dear Mr. Tobin:

You had earlier called my office to ask about Congressional intent in the drafting and passage of two pieces of legislation wherein was referred to the "boundaries" of a reservation. The government now in the cases of **De Coteau v. Tenth** District Court and Erickson v. Feather cites in its amicus brief (p. 27) that the language of P. L. 93-489 and P. L. 93-491 is the basis for a "Congressional understanding that the Reservation was never abolished and always included non-trust lands."

This is to inform you that the term "reservation" was used generically, that the substance of the legislation was for the benefit of Indians only, and that at no time did the U. S. Senate either take up or dispose of the question of reservation boundaries of the Lake Traverse Indian Reservation.

With every good wish, I am

Sincerely,

George McGovern

Tom Tobin, Esq.
Winner, SD 57580

APPENDIX B

JAMES ABOUREZK
SOUTH DAKOTA

United States Senate
WASHINGTON, D.C. 20510

December 2, 1974

Mr. Tom Tobin
Attorney at Law
Winner, South Dakota 57580

Dear Mr. Tobin:

This letter is in response to your inquiry about Congressional intent with respect to two cases now pending: DeCoteau v. Tenth District Court, and Erickson v. Feather. The Government cites in its amicus brief (p. 27) PL 93-489 and PL 93-491 as a basis for a "congressional understanding that the Reservation was never abolished and always included non-trust land."

This is to inform you that at no time during the deliberation of this legislation did the U.S. Senate either take up, or dispose of, the question of reservation boundaries of the Lake Traverse Indian Reservation.

Sincerely,

James Abourezk
United States Senate

cc: Hon. Robert Bork
Solicitor General of the United States

Mr. Bert Hirsch
American Association of Indian Affairs

APPENDIX C

JAMES ABDNOR
[illegible]

Congress of the United States
House of Representatives
Washington, D.C. 20515

December 5, 1974

PUBLIC WORKS
[illegible]
VETERANS' AFFAIRS
[illegible]

Mr. Tom Tobin
Special Assistant to the Attorney
General of South Dakota
Winner, South Dakota 57580

Dear Mr. Tobin:

This letter is in response to your inquiry about Congressional intent with respect to two cases now pending: DeCoteau v. Tenth District Court, and Erickson v. Feather. The Government cites in its amicus brief (p.27) PL 93-489 and PL 93-491 as a basis for a "congressional understanding that the Reservation was never abolished and always included non-trust land."

I was present when the House of Representatives considered this legislation and of course took a special interest in it as it pertains to my state. From my recollection and my review of the record I concludes that at no time during the deliberation of this legislation did the House of Representatives either take up, or dispose of the question of reservation boundaries of the Lake Traverse Indian Reservation.

Sincerely,

JAMES ABDNOR
Member of Congress

JA/hga

APPENDIX D

FRANK E. DENHOLM

Congress of the United States
House of Representatives
Washington, D.C. 20515

December 6, 1974

Thomas Tobin, Esq., Special Assistant
Office of the Attorney General
State of South Dakota
Winner, South Dakota 57580

Re: Public Law 93-489 and 93-491
and Your Inquiry of 11/26/74

Dear Mr: Tobin:

The above referenced legislation enacted by the Congress pertained and does pertain only to specific lands as described therein.

The reference to Public Law 93-489 and Public Law 93-491 in the Reply Brief of the Petitioner in the matter entitled, "De Coteau vs. The District County Court, et.al." is for judgment of the Court. The intent and purpose of the Congress is clear upon enactment of the laws as provided therein.

It is my opinion that it was not the objective of the authors, the sponsors or those that voted for or against the enactment of P.L. 93-489 or P.L. 93-491 to determine the broader and far more comprehensive issues of jurisdiction and there is nothing in the legislative history of record contrary to my conclusion accordingly.

Thank you very much.

Sincerely,

Frank E. Denholm

FRANK E. DENHOLM, M.C.